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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-292

THE UTE INDIAN TRIBE,

Petitioner,

vs.

THE STATE TAX COMMISSION OF UTAH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the Ute Indian Tribe, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 17, 1978, reversing and remanding the judgment of the United States District Court for the District of Utah dated February 25, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A. The Order denying the Petition for Rehearing, and the Findings of Fact, Conclusions of Law and Order rendered below by the United States District Court for the District of Utah also appear in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 17, 1978. A timely petition for re-hearing was denied on June 2, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the respondent Tax Commission has jurisdiction to impose Utah sales tax on sales by the Ute Tribe on trust lands and elsewhere in Utah, where the tax in question is a transaction tax, the incidence of which falls equally on both buyer and seller and where the tribe also has a valid sales tax ordinance taxing the identical sales by the tribe.

2. Whether the summary collection and enforcement procedures used against the Ute Tribe by the Tax Commission below, which included docketing a warrant against tribal trust property, constitute unreasonable interference with the internal affairs and right of self determination of the Tribe on its reservation.

3. Were the District Court's findings that the petitioner's federally recognized Indian reservation continues to exist within its original reservation boundaries clearly erroneous, as determined by the Court of Appeals, in light of the fact that such findings were supported by competent evidence received at trial, without opposing evidence being offered, and in light of the presumption of continued reservation existence absent clear, unambiguous proof to the contrary.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case directly involves Article I, Section 8, Clause 3 of the Constitution of the United States; Article III, Constitution of Utah; the Utah Enabling Act (Act of July 16, 1894; 28 Stat. 107), Section 3; 25 U.S.C. § 476; 25 U.S.C. § 1322; and Title 59, Chapter 15, Utah Code Annotated (1953) Sections 2 (h), 4, 5, 8 and 11, all of which are printed in Appendix B.

STATEMENT OF THE CASE

Petitioner, the Ute Indian Tribe (herein referred to as the "Tribe" or "Ute Tribe"), is a federally recognized[1] American Indian Tribe exercising powers of self-government[2] on the Uintah and Ouray Indian Reservation in the State of Utah.[3] The Ute Tribe has never, by agreement or otherwise,[4] submitted to the jurisdiction of the State of Utah pursuant to 25 U.S.C. § 1321 et seq., for the purposes of taxation or otherwise.[5]

Utefab, Ltd., at all times relevant herein, was a wholly-owned economic enterprise of the Ute Tribe established to provide employment for, and develop work skills in, members of the Tribe. It was engaged in the business of producing cabinetry and millwork at its plant on trust lands on the Uintah and Ouray Reservation.[6]

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[1]App. A, Finding of Fact No. 4.

[2]App. A, Finding of Fact Nos. 6 and 7.

[3]App. A, Finding of Fact Nos. 5 and 6.

[4]See 25 U.S.C. §1321 et seq.; *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

[5]App. A, Finding of Fact No. 9.

[6]App. A, Finding of Fact No. 10.

The Ute Tribe is organized[7] under a tribal Constitution and Bylaws[8] which establish a Tribal Business Committee empowered, *inter alia,* to promulgate and enforce tax ordinances, to levy taxes and license fees within its reservation, and to regulate trade upon the reservation.[9]

The Ute Tribe's Tribal Business Committee adopted an ordinance, effective January 1, 1974, which provides for the taxation of sales to or by Indians within the exterior boundaries of the Tribe's reservation[10] Prior to that time, Utefab had collected Utah sales taxes and had prepared and filed Utah sales tax returns with respondent State Tax Commission of the State of Utah (herein referred to as the "Tax Commission" or the "Commission"), for sales occurring during the period January 1, 1971, through December 31, 1973. Such sales were made at the tribal plant on trust land within the reservation to both Indian and non-Indian purchasers with delivery taken both on trust and non-trust lands within the Tribe's reservation, as well as outside of the reservation.[11]

In March of 1974, the Tribe made demand upon the Tax Commission for the return of said sales tax remittances by means of a formal application and claim for a refund. The Tax Commission refused to refund any of the money so collected.[12] While such claim for a refund was pending the Tax Commission docketed a warrant for delinquent sales tax remittances against the Tribe

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[7]See 25 U.S.C. §476.

[8]App. A, Finding of Fact Nos. 6 and 7.

[9]App. A, Finding of Fact No. 7.

[10]App. A, Finding of Fact No. 8.

[11]App. A, Finding of Fact Nos. 11, 12 and 13.

[12]App. A, Finding of Fact No. 16.

and its real and personal property.[13] Under Utah law,[14] such a warrant has the legal effect of an execution upon the personal property of the Tribe and becomes a lien in the nature of a docketed judgment upon the real property of the Tribe, all of which real property is held in trust for the Tribe by the United States of America.[15]

Following the docketing of said warrant against the Tribe and its real and personal property, the Tribe instituted this action for declaratory and injunctive relief against the Tax Commission and for the return of the State sales tax proceeds remitted by the Tribe to the Tax Commission. Sometime after the filing of a complaint in the Utah Federal District Court, the Tax Commission released the warrant.[16] Jurisdiction in the District Court was predicated upon 28 U.S.C. § 1331 (Federal Question) and 28 U.S.C. § 1362 (Actions by Indian Tribes.)[17]

Following trial to the court without a jury, the District Court made extensive Findings of Fact and Conclusions of Law[18] and, based thereon, determined, *inter alia,* that the Tribe's tax ordinance was valid. The District Court further enjoined the Tax Commission from collecting sales and use taxes on sales by the Ute Tribe or by or to Indians within the Ute Tribe's reservation and ordered certain Utah sales tax proceeds collected and paid by Utefab refunded to the Tribe.

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[13]App. A, Finding of Fact No. 17.

[14]§ 59-15-11, U.C.A., 1953, appended hereto as part of Appendix B.

[15]App. A, Finding of Fact No. 18; See Appendix B § 59-15-11 U.S.C. 1953. Congress has expressly provided for the continuation of Federal Restrictions on the property of the Ute Indian Tribe. See 25 U.S.C. § 677 et seq.

[16]App. A, Finding of Fact Nos. 1, 2, 3 and 19.

[17]See *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

[18]Appendix A.

Following entry of this judgment, the Tax Commission sought to reopen the case to challenge the District Court's findings regarding the boundaries and status of the Tribe's reservation and for the first time, to present evidence in relation thereto. All such motions were denied by the District Court, following which the Tax Commission perfected an appeal to the Court of Appeals for the Tenth Circuit.

In connection with its appeal, the Tax Commission attempted to supplement the trial court record by submitting hundreds of pages of documents purporting to bear on the issue of the present status of the Ute Tribe's Uintah and Ouray Reservation. The Court of Appeals refused to receive such documents, but in its decision[19] determined that the findings by the District Court as to reservation boundaries and the extent of the trust lands were "clearly erroneous."

As to the remainder of the District Court's findings, the Court of Appeals affirmed the jurisdiction of the District Court over the proceedings, affirmed the findings regarding lack of State power to tax sales by Indians to Indians, but reversed the District Court's findings regarding the nature of the Utah sales tax, the right of the Tribe to a refund for moneys paid to the State prior to 1974, and decreed that, under the holding of *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), the Utah sales tax was applicable to sales by the Tribe's commercial enterprise (Utefab) to non-Indians on trust lands. No mention is made in the opinion either of the Ute Tribe's own taxing ordinance or of the effect of the Tax Commission's enforcement warrant on the trust property of the Tribe. The case was thereupon "Reversed and Remanded for further proceedings" consistent with the opinion.

[19]Appendix A.

This Petition follows the refusal of the Court of Appeals to grant a rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals below sanctions interference by a state with the internal affairs and right of self determination of a federally recognized Indian Tribe on its reservation and is in direct conflict with prior decisions of this Court in this regard. *Bryan v. Itasca County,* 426 U.S. 373 (1976); cf. *United States v. Wheeler,* 46 U.S.L. Week 4243, (U.S. March 22, 1978); *Santa Clara Pueblo v. Martinez,* 46 U.S.L. Week 4412 (U.S. May 15, 1978).

Petitioner believes that the central question of "whether the state action infringed on the right of reservation Indians to make their own laws and to be ruled by them" has been decided below in a manner inconsistent with *Williams v. Lee,* 358 U.S. 217 (1959) and *McClanahan v. State Tax Commission,* 411 U.S. 164 (1973).

The Court of Appeals, while acknowledging "a preemption of State taxing authority by federal legislation," completely ignores both the existence of the Tribe's sales tax on sales to or by Indians within the reservation and the summary collection procedures used by the Tax Commission to enforce jurisdiction over the Tribe. It further holds that "sales not on trust lands by the Tribe to Indians only are not within the state taxing power."

As this factual matter, i.e. sales to Indians only outside the reservation was not ever before the Court below,

the "holding" only serves to obscure the real issues of interference with tribal self-determination.

The effect of the decision is that sales by the Tribe on trust lands to non-Indians are subject to two taxes. The Tribe must either repeal its tax or suffer the competitive disadvantage of requiring purchasers of its goods on the reservation to pay a double tax. The decision further denies the Tribe the right to regulate commerce with its own members within its reservation where either fee lands or non-Indians are involved.

2. The decision below stands for the proposition that the only Indian related sales which are not subject to state jurisdiction are those on trust lands between Indians. As such it contradicts decisions of this Court relating to Indian Traders and Indian Country. See *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965).

This Court on several occasions has considered the propriety of state tax jurisdiction on Indian Reservations. Where the incidence of the tax sought to be imposed falls directly upon an Indian or an Indian Tribe, the tax has been found to be an impermissible burden on "Commerce . . . with the Indian Tribes." *Warren Trading Post v. Arizona Tax Commission, Supra.; McClanahan v. State Tax Commission, Supra.;* cf. 25 U.S.C. § 261.

One of the most recent cases to consider this issue was *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976). There the pivotal jurisdictional issue was the incidence of the tax. Construing a Montana Statute which conclusively presumed the tax to be on the non-Indian consumer, the Court ruled that the state could impose a minimal collection burden on Indian retailers designed to avoid the likelihood that non-Indians purchasing from tribal sellers would avoid the payment of a lawful tax.

However in *Moe,* this Court expressly declined to express an opinion on the "complicated problems" of enforcement of state jurisdiction over Indian sellers. 425 U.S. at p. 467 n. 6. The Appellate Court below ignored the fact that this action resulted only after the Utah Tax Commission asserted jurisdiction over the Ute Tribe by docketing a warrant against all of its real and personal property.

The enforcement problems contemplated in *Moe* were before the Court of Appeals. It resolved them by disregarding the requirement established by 25 U.S.C. § 1326 and *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971), that tribal consent be given as a precondition to the assumption of state jurisdiction. The opinion below reversed the trial court's decision condemning such collection procedures, and by inference authorizes the imposition of state tax jurisdiction on Indian Tribes under threat of execution and sale of tribal property.

Petitioner believes that the decision below is inconsistent and in conflict with decisions of this Court in these regards.

3. The decision below is in conflict with established congressional policies relating to Indian taxation.

This Court has recently reaffirmed that "Congress has plenary authority to legislate for the Indian Tribes in all matters,. . ." *United States v. Wheeler,* 46 U.S.L. Week 4243 (U.S. March 22, 1978). Congress, in exercising this power has legislated both generally and specifically in terms which conflict with the Court of Appeals'

finding that the Ute Tribe is subject to the jurisdiction of the Utah Tax Commission both for purposes of sales tax liability and enforcement of such taxes. In general terms, the stated Congressional policies of both the Indian Self-Determination Act of 1975 (25 U.S.C. § 450 et seq., especially § 450(a) "Congressional Declaration of Policy") and the Indian Financing Act of 1974 (25 U.S.C. § 1451 et seq., especially § 1451 "Congressional Declaration of Policy") are but recent reaffirmations of "the well-established federal policy of furthering Indian self-government" (*Santa Clara Pueblo v. Martinez,* 46 U.S.L. Week 4412 (U.S. May 15, 1978).

In failing to consider the effect of the Tax Commission's taxing powers and collection procedures on the Ute Tribe herein, the Court of Appeals has run afoul of the several federal statutes which expressly deny such power to the State of Utah. These include:

(1) 25 U.S.C. § 476 (Section 16 of the Indian Reorganization Act of 1934) which vested in the Ute Tribe (pursuant to the adoption of its Tribal Constitution) the power "to prevent the sale, disposition, lease, *or encumbrance* of tribal lands, or other tribal assets without the consent of the Tribe." (emphasis added). This Court has previously noted that, "The [Indian] Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 153 (1973).

(2) 25 U.S.C. § 1322(b) which, even if the state of Utah had otherwise assumed jurisdiction over the Ute Tribe, which it has not, would have prevented the state from attempting any "alienation, *encumbrance, or taxation* of any real or personal property . . . belonging to any Indian or Indian tribe." (emphasis added).

(3) The Utah Enabling Act of July 16, 1894 (28 Stat. 107) (See Appendix B herein) which provides that,

> The people inhabiting said proposed state do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . (Section 3).

This provision is carried forth and incorporated into the Utah Constitution. See Article III, Paragraph "Second."

25 U.S.C. § 476 is important also because it specifically confirmed in Indian tribes "all powers vested in any Indian tribe or tribal council by existing law." Shortly after this language was adopted by Congress in 1934, the Solicitor of the Department of the Interior issued an opinion identifying and defining such "powers." This opinion, entitled "Powers of Indian Tribes," 55 I.D. 14 (1934), under the sub-heading "The Taxing Power of an Indian Tribe," states as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. (55 I.D. at 46).

This opinion has been recently cited by this Court as identifying such powers. See *United States v. Wheeler, supra.,* n. 27.

Petitioner submits that substantial questions, critical to every Indian Tribe seeking economic self-determination, exist as a result of these general and specific congressional

pronouncements and the opinion of the Court of Appeals imposing Utah sales taxes and enforcement procedures on the Ute Tribe.

(4) The Court of Appeals reversed the finding of the Chief Judge of the District of Utah as to the incidence and nature of the Utah Tax and held that "The Utah sales tax . . . places a tax on the purchaser of tangible personal property . . ."

Petitioner respectfully submits that numerous decisions of the Utah Supreme Court, together with the language of the Utah Sales Tax Act itself, contradict this conclusion.

The Utah tax in question is "[a] tax upon every retail sale of tangible personal property made within the State of Utah. . ." § 59-15-4 U.C.A. (1953) (See Appendix B for all cited provisions of the Utah Code Annotated). Vendors receiving consideration upon a sale of tangible property or service "are responsible for the collection of the amount of the tax imposed on [the] sale." § 59-15-5 U.C.A. (1953). "The word 'tax' means . . . the aggregate amount of taxes due from the vendor . . . during the period for which he is required to report his collections. . ." § 59-15-2(h) U.C.A. (1953).

The vendor is required to collect the tax from the vendee, file quarterly returns and remit taxes on total sales during the reporting period. § 59-15-5 U.C.A. (1953). Failure to do so subjects the vendor to absolute liability for the tax, criminal sanctions, penalties, and interest.

Section 59-15-11, U.C.A., (1953), dealing with subject of "Collection of Tax by Warrant" states as follows:

> A tax due and unpaid under this act shall constitute *a debt due the state from the vendor* and may be collected, together with interest, penalty and costs, by appropriate judicial proceeding. . . . (emphasis added)

Since shortly after passage of the Utah sales tax law in 1933, the Utah Supreme Court held that,

> The Sales Tax Act *imposes the tax on the transaction.* The amount of consideration involved in the sale or transaction (a sale always involves a purchase) is the measure to which the rate is applied.
>
> • • •
>
> The vendor or the person receiving the payment or consideration upon a sale is charged under the law with the responsibility of collecting or accounting to the[20] State for the tax imposed. (emphasis added)

That the burden or incidence of the Utah sales tax falls on sellers as well as buyers is emphasized by the following:

> It is the duty of the vendor to collect the tax from vendees who are "consumers" and to remit the same with proper records to the Tax Commission. [Citing what is now § 59-15-5, U.C.A., (1953)] However, the last cited section of the code makes the vendor to consumers liable for the sales tax regardless of whether or not said vendor collects said tax from the vendee.[21]

That the vendor is a "taxpayer" under the Utah law is reaffirmed by the following:

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[20] *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P.2d 629, 630-1 (1936). See also *Union Stock Yards v. State Tax Commission of* Utah, 93 Utah 174, 71 P.2d 542 (1937).

[21] *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P.2d 324, 326-7 (1946).

> First we must clarify that the sales tax is imposed upon all *sales* of tangible personal property where passage of title and delivery occur within the State of Utah. . . . One need not be "retailer" to be taxed. *Either retailers or wholesalers are taxed if the sale is to the consumer or user.* (First emphasis in original; second added.)[22]

Further, Section 59-15-11, U.C.A., (1953), specifically refers to the party against whom the State's collection warrant is issued as "the delinquent taxpayer."

The clear error of the Circuit Court in reversing the District Court's finding that the Ute Tribe is entitled to the refund is manifest in Section 59-15-8 of the Utah statute dealing with "Overpayments and deficiencies," which provides:

> If the amount paid exceeds that which is due, the excess, . . . shall be credited or refunded *to the person paying it* upon written application therefor. If the commission determines that any amount . . . has been erroneously or illegally collected or computed, the commission shall certify to the State auditor the amount collected is excess of what was legally due, *from whom it was collected or by whom paid to the Commission . . . and the balance shall be refunded to that person* . . . .

The importance of further review of this issue by this Court is not limited to whether or not the Tribe gets the refund, but is demonstrated by the emphasis in the *Moe* decision that the tax considered therein was solely a tax on the non-Indian customer and not a tax on the reservation Indian himself. If in fact the burden of the Utah sales tax is on the Indian vendor (the Ute Tribe

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[22] *Ogden Union Railway and Depot Co. v. State Tax Commission,* 16 Utah 2d 23, 395 P2d 57, 59-60 (1964).

herein), on the reservation, as the District Court found, then state enforcement of the tax herein should be precluded by such decisions of this Court as *Mescalero Apache Tribe v. Jones,*[23] *McClanahan v. Arizona Tax Commission,*[24] and, recently, *Bryan v. Itasca County.*[25]

(5) The Court of Appeals below departed from the standard of review in Indian reservation status cases by reversing and remanding the District Court's findings relative to petitioners' reservation.

The case was presented to the District Court on largely stipulated facts. The parties agreed for the purposes of this case that the reservation existed and that sales took place within and without the reservation. No contradictory evidence was offered at trial. No significant objection was raised by the Tax Commission to the District Court's findings and decision which incorporated the parties' stipulations and other testimony concerning these issues.

For the first time on appeal below, the Tax Commission proffered voluminous exhibits as a proposed appendix to its brief purporting to evidence what it claimed was congressional intent to disestablish the Uintah and Ouray reservation. The Court of Appeals refused to accept the exhibits, but nevertheless stated that the issue of "the boundaries of the reservation or what might constitute trust lands" was "not the subject to a stipulation binding on the Court in any manner. The finding by the Trial Court as to the reservation boundaries or as to trust lands was clearly erroneous."

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[23] 411 U.S. 145 (1973).

[24] 411 U.S. 164 (1973).

[25] 425 U.S. 373 (1976).

Petitioner believes that the Appellate Court acted inappropriately and in conflict with decisions of this Court when it refused to accept the stipulated record of the Trial Court. The case of *H. Hackford & Co. v. United States,* 197 U.S. 442 (1905), involved a stipulation of ultimate facts which the Court of Appeals concluded was not binding.

This Court then stated:

> "We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record were established no less than the specific facts recited." (Ibid. P. 447). See also *Kelley v. Rhodes,* 188 U.S. 1 (1902).

The Tribe submits that for the Court of Appeals to find the record below lacking in "evidence or basis" and consequently clearly "erroneous" is a fundamental breach of that Court's appellate responsibility, meriting plenary review by this Court

In response to the District Court's findings regarding the status and extent of petitioner's reservation, the Court of Appeals stated:

> We are unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands. The issue was not litigated apparently due to a misunderstanding as to a provision of the pretrial order. . . . The finding by the trial court as to the reservation boundaries or as to trust lands was clearly erroneous.

This pronouncement by the Court of Appeals ignores the pleadings, admissions, pre-trial order and stipulations

before the District Court. It further disregards testimony and exhibits received from the United States Bureau of Indian Affairs Realty Officer for petitioner's reservation as to the location of the original reservation boundaries.[26]

Even in its Reply Brief filed with the Court of Appeals, the Tax Commission concluded that "it is fair to say a 'reservation' consisting only of the present trust lands . . . continued even after 1905."[27]

The Commission further contended in the same brief:

> "The original Uintah Reservation and the original Uncompahgre Reservation were disestablished by acts of Congress, *and the present Uintah and Ouray Reservation occupies an area smaller than contained in the two former reservations.*" (emphasis added)[28]

All of the evidence below was to the effect that the Ute Tribe has a reservation, that sales took place from trust lands on that reservation to buyers on trust lands, on private lands within the original boundaries of the reservation and outside those boundaries altogether. The Tribe claimed all of these sales were exempt from Utah tax jurisdiction. The Commission took a contrary view. The Trial Court agreed with the Tribe.

An issue which was not litigated was the Tax Commission's belated assertion that the Tribe's reservation had been disestablished or diminished, but this claim was

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[26]Trial Transcript Feb. 11, 1976 pp. 37-49.

[27]Reply Brief of the State of Utah, P. 13.

[28]Reply Brief of the State of Utah, P. 13. The Commission by these concessions apparently abandoned its claim that the Tribe's present reservation was disestablished.

never made *until after the trial* in the District Court, by pleadings or otherwise.

The Court of Appeals apparently determined that this was a threshold question which should have been tried in the District Court and remanded the case for this purpose. Petitioner believes this conclusion to be erroneous for two reasons.

First, as long as there is no dispute regarding the fact that sales by the Tribe were made from trust lands, there was ample evidence and precedent for the District Court to find that the Commission had no jurisdiction over the Tribe for purposes of these sales in this case. In such circumstances the issue of diminishment of the Tribe's reservation is immaterial to the resolution of any questions of state jurisdiction over the Tribe. Further, as the existence of the tribe, and a valid tribal tax ordinance were undisputed, the question of the right of the tribe to impose a sales tax on sales by its tribal enterprise on trust lands to buyers anywhere would appear unaffected by any diminishment issue sought to be raised by the Tax Commission.

Second, as the burden of proving reservation diminishment or disestablishment has always been on the proponent of such a contention, the Tax Commission's burden below was to show a clearly expressed congressional intent to disestablish or diminish, absent which showing, this Court requires all reasonable ambiguities to be resolved in favor of the Indians and in favor of continued reservation existence. See *DeCoteau v. District County Court,* 420 U.S. 425, 444-447 (1975).

The Court of Appeals has not only disregarded the record before it, but has apparently reversed the long standing presumptions regarding reservation status and

the burden of proving reservation disestablishment. A further review of this matter is appropriate to affirm the proper judicial standard of review applicable to such a case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

OPINIONS AND JUDGMENT BELOW

I. FINDINGS, CONCLUSIONS AND ORDER OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. C 74-183

THE UTE INDIAN TRIBE,

Plaintiff,

vs.

STATE TAX COMMISSION OF THE STATE OF UTAH,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on regularly for trial on the 11th day of February, 1976, upon the Amended Complaint of the plaintiff for declaratory judgment, injunctive relief and return of taxes alleged to have been improperly collected, and the plaintiff, The Ute Indian Tribe, appearing by and through its counsel, F. Burton Howard, and defendant, State Tax Commission of the State of Utah, appearing by and through its counsel, G. Blaine Davis, and the Court having heard the evidence and having considered the pleadings and the exhibits admitted into evidence, and after argument of counsel, the Court hereby makes the following

FINDINGS OF FACT

1. This is an action in four counts for declaratory relief declaring that sales and use taxes on sales by the Ute Indian Tribe and its tribal enterprise, Ute Fab, Ltd., as levied by the defendant are illegal and invalid, and further declaring that the defendant has no jurisdiction to levy or collect sales or use taxes or otherwise interfere with the commercial activities of the plaintiff on the Uintah and Ouray Indian Reservation.

2. Plaintiff in this action further seeks declaratory relief that a judgment warrant docketed against properties held in trust for the plaintiff by the United States of America is void and that plaintiff's tax ordinance is valid and effective within the exterior boundaries of the Reservation.

3. The action further requests an order compelling the return of monies erroneously forwarded by the plaintiff to the defendant and enjoining and restraining further levy and collection of sales and use taxes or further docketing warrants to effect the collection of the same against the Tribe.

4. Plaintiff is a sovereign American Indian Tribe organized pursuant to Act of Congress of June 18, 1934, (48 Stat. 984), 25 U.S.C. § 761, et seq., as amended, with its governing body duly recognized by the Secretary of the Interior, and its existence is within Federal jurisdiction and is governed by the laws of the United States. In such capacity plaintiff is an instrumentality of the United States.

5. The Uintah and Ouray Reservation was created and exists and its boundaries established under and pursuant to Executive Orders of October 3, 1861 and January

5, 1882 and Acts of Congress of May 5, 1864, (13 Stat. 63) and March 11, 1948 (62 Stat. 72) and the laws of the United States.

6. Pursuant to Act of Congress of June 18, 1934 (48 Stat. 984), plaintiff adopted its Constitution and By-Laws confirming and extending plaintiff's jurisdiction to the territory within the exterior boundaries of the Uintah and Ouray Reservation as set forth by the above mentioned Executive Orders and Acts of Congress.

7. Plaintiff's Constitution further empowers plaintiff's Tribal Business Committee to promulgate and enforce tax ordinances, to levy taxes and license fees upon non-members doing business within the Reservation, and to regulate trade upon the Reservation.

8. Plaintiff, through its governing body, the Tribal Business Committee, duly adopted an ordinance effective January 1, 1974, which provides for the taxation of sales to or by Indians within the exterior boundaries of its Reservation. Defendant also levied and attempted to collect sales taxes on sales by the plaintiff during the first quarter of 1974.

9. Plaintiff at no time, by agreement or otherwise, has submitted to the jurisdiction of or ceded jurisdiction to the State of Utah or to the State Tax Commission to levy or collect sales or use taxes on sales to or by Indians on the Uintah and Ouray Reservation nor has there been any enactment by Congress providing that Utah law shall apply to such sales.

10. Plaintiff, acting through its tribal enterprise, Ute Fab, Ltd., for the purpose of developing skills of tribal members and assisting in the attainment of eco-

nomic self-sufficiency for the Ute Indian Tribe, makes, sells and distributes personal property of various kinds, including cabinets, millwork, wood products, furniture and associated hardware and tools from its plant on the Uintah and Ouray Reservation.

11. Said personal property was sold by the plaintiff and delivery was taken by purchasers from the plaintiff at three general areas, to-wit:

A. Plaintiff's plant at the Tribal Headquarters on lands originally received as part of the original Uintah and Ouray Indian Reservation and administered by the Bureau of Indian Affairs as trust lands.

B. Lands within the present exterior boundary of the Reservation which were originally part of the Uintah and Ouray Indian Reservation but are presently owned in fee by other individuals primarily non-Indians.

C. Lands outside the exterior boundaries of the Reservation which are not now and never have been part of the Uintah and Ouray Indian Reservation.

12. That during the period January 1, 1971, through December 31, 1973, plaintiff prepared and filed sales tax returns and reported sales to the defendant as follows:

A. Sales made from plaintiff's plant at the Tribal Headquarters where delivery was taken on trust lands maintained as part of the Uintah and Ouray Indian Reservation, $132,140.61.

B. Sales made from plaintiff's plant at the Tribal Headquarters and delivered by plaintiff in plaintiff's vehicles within the present exterior boundaries of the Reservation to purchasers primarily non-Indians on lands

owned in fee and not administered as trust lands by the Bureau of Indian Affairs, $3,915.42.

C. Sales made from plaintiff's plant at the Tribal Headquarters and delivered by plaintiff in plaintiff's vehicles to purchasers outside of the present exterior boundaries of the Reservation, $211,465.85.

13. In the course of making the aforesaid sales, plaintiff collected from all of its purchasers a sales tax at the rate of 4½% and inadvertently and erroneously forwarded said sales tax to the defendant Tax Commission.

14. The total amount of money forwarded to the Tax Commission pursuant to said sales tax returns was $15,430.33.

15. The portion of the $15,430.33 attributable to each of the aforesaid areas is as follows:

A. $5,737.02

B. $ 177.36

C. $9,515.95

16. In March of 1974 plaintiff made demand of defendant for return of the $15,430.33 and filed a formal application and claim for refund in an administrative proceeding with defendant Tax Commission. Defendant refused to return any part of those monies.

17. On May 22, 1974, prior to any hearing or decision by the Tax Commission, defendant docketed a warrant for delinquent sales tax for the period January 1, 1974, through March 31, 1974, against the plaintiff and its real or personal property.

18. Section 59-15-11 and Section 59-16-15, U.C.A., 1953, the Utah statutes which authorized this warrant, purport to authorize a lien upon the real property of the plaintiff, i.e., trust property, the legal owner of which is the United States of America and which is administered by the Bureau of Indian Affairs for the plaintiff, and further direct the County Sheriff of the County where the property is located to levy upon and sell the real and personal property of the plaintiff to satisfy the delinquent tax. These statutes also purport to have the force and effect of an execution against all personal property of the plaintiff and to create a lien upon the real property of the United States of America, in the same manner as a docketed judgment.

19. Plaintiff thereupon sought relief in this Court and filed its Complaint herein; sometime after the filing of the Complaint, defendant released the warrant.

20. After the filing of the Complaint, the defendant continued to audit the plaintiff's business activities and requested that the plaintiff appear at administrative hearings to determine additional sales tax liability on sales unrelated to the Complaint herein.

21. In an additional claim for refund of sales taxes filed with the defendant in March of 1974 by an enrolled member of plaintiff's Tribe requesting relief from the State sales tax imposed on the purchase of a trailer home where delivery was taken upon plaintiff's Reservation on trust lands, the defendant failed to respond and refused to grant a hearing on such claim and has continued to fail and refuse to apply applicable law and render a decision regarding whether said purchase was exempt from Utah sales taxes.

22. In addition, the defendant has continued to require the Tribe to pay sales and use taxes on purchases of property for the use and benefit of the Tribe during the pendency of this action.

23. Throughout the pendency of this matter, defendant has continued to attempt to collect sales and use taxes from the plaintiff and under Utah law will continue to levy and collect such taxes from the plaintiff in the future by the docketing of warrants or otherwise unless restrained by this Court.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of the Complaint.

2. A justiciable controversy exists between the parties herein.

3. The plaintiff is the real party in interest and has standing to bring this action.

4. By Act of Congress of April 11, 1968, (82 Stat. 78, 79) 25 U.S.C. §§ 1321 and 1322, the United States has given its consent to the States to assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country within a state on the condition that the affected tribe consents to such jurisdiction. This Act further prohibits the alienation, encumbrance or taxation of real or personal property belonging to or held in trust by the United States for any Indian or any Indian Tribe. The Act further provides that any tribal ordinance adopted by any

Indian Tribe in the exercise of the authority which it possesses shall be given full force and effect in the determination of civil causes arising under the Act.

5. The area within the exterior boundaries of plaintiff's Reservation is Indian country, notwithstanding the existence of patented or fee lands within said boundaries, and as the plaintiff has not consented to the jurisdiction of the defendant by agreement or otherwise and as there has been no enactment by Congress providing that Utah State law shall apply to the sales within the Reservation, the defendant has no jurisdiction within the exterior boundaries of the Reservation to tax Indians or Indian property.

6. The imposition of sales taxes on commercial transactions between plaintiff and others by the defendant violates the exclusive Federal jurisdiction over the right to regulate commerce with the Indian tribes established by Article I, Section 8, of the United States Constitution.

7. The collection and retention of sales and use taxes by defendant which were paid by plaintiff in the amounts herein set forth violate the provisions of Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States.

8. Congress has preempted State taxation of sales to or by Indians on Indian Reservations by the enactment of Title 25, §§ 261 through 264 of the United States Code.

9. The Utah State Constitution Article III, Section 2, acknowledges the absolute jurisdiction and control of the Congress of the United States over Indian lands and precludes the taxation of such lands until the title thereto shall have been extinguished by the United States.

10. Section 63-36-16, U.C.A., 1953, specifically limits the authority of the defendant to encumber or tax any real or personal property of the plaintiff and further disclaims jurisdiction in the Utah courts to adjudicate questions raised by the docketing of the warrant herein. Accordingly, litigation involving the alienation, encumbrance, or taxation of Indian property or purporting to restrict the use of such property must be resolved other than in the courts of the State of Utah.

11. The defendant has no jurisdiction to tax sales to or by the plaintiff within the exterior boundaries of the Uintah and Ouray Reservation.

12. The defendant further has no jurisdiction over sales made by the plaintiff from its plant at the Tribal Headquarters even if delivery of property sold occurs outside of the exterior boundaries of the Uintah and Ouray Reservation.

13. Sales made by the plaintiff where delivery was taken upon fee lands within the exterior boundaries of plaintiff's Reservation are deemed to have occurred within the exterior boundaries of the Reservation and are exempt from State jurisdiction.

14. The exercise of State jurisdiction to tax sales to or by Indians within plaintiff's Reservation interferes with plaintiff's right of tribal self-government and its right to self-determination and impairs rights granted or reserved by Federal law.

15. Plaintiff is the person who paid the tax to the defendant and therefore it is a taxpayer and is the person to whom the refund should be paid pursuant to the provisions of Section 59-15-8, U.C.A., 1953.

16. The defendant should be required to return to the plaintiff all sums inadvertently and erroneously forwarded and paid to defendant pursuant to the sales tax returns filed herein.

17. This Court should permanently enjoin the defendant from making further levy and collection of sales and use taxes on any sales made by the plaintiff or on sales to or by the plaintiff or other Indians within the exterior boundaries of the Uintah and Ouray Indian Reservation.

18. This Court should declare that all monies forwarded to the defendant by plaintiff be returned to plaintiff regardless of whether the sales took place within or without the exterior boundaries of the Reservation.

19. Title to lands held in trust by the Federal Government for Indians can be extinguished only with Federal consent and the determination of such titles is a matter of Federal law.

20. The defendant may not without the consent of Congress tax the property of the United States nor may it tax instrumentalities of the United States.

21. The assessment, levy and attempted collection by warrant of sales or use taxes by defendant on sales to or by the plaintiff as an instrumentality of the United States are illegal as to plaintiff and violate the provisions of Article I, Section 8, and Section VI, Clause 2, of the Constitution of the United States.

22. The warrant docketed by the defendant on May 22, 1974, is and should be declared by this Court to be null and void.

23. This Court should permanently enjoin the defendant from further docketing warrants pursuant to the provisions of Sections 59-15-11 and 59-16-15, U.C.A., 1953, as amended.

24. The Sales Tax Ordinance, effective January 1, 1974, adopted by plaintiff should be declared to be a validly existing tax ordinance in full force and effect within the exterior boundaries of plaintiff's Reservation, and defendant should be determined to be without authority to tax sales or to proceed in any way so as to conflict or interfere with the tax ordinance adopted by the plaintiff.

25. The plaintiff is an instrumentality of the United States for all purposes pertinent hereto.

26. One of the purposes of 28 U.S.C. § 1362 is to permit tribes to initiate litigation in the Federal Courts involving issues which could have been instituted by the United States as Trustee for the tribes, and the action herein could have been instituted by the United States.

27. The doctrine of sovereign immunity does not bar an action against a state agency for declaratory and injunctive relief against the application of State statutes which violate provisions of the Constitution of the United States.

28. Plaintiff was not required to exhaust administrative remedies with the defendant Tax Commission or with the courts of the State of Utah as a condition precedent to filing its Complaint herein.

29. A plain, speedy, efficient or otherwise adequate remedy was and is not available under Utah law or in the courts of the State of Utah to provide plaintiff the relief to which it is herein entitled.

30. Defendant by its actions in docketing a warrant against the property of the United States on May 22, 1974, and voluntarily and arbitrarily asserting a judgment lien against said property has waived its immunity from suit and consented to a determination of its rights herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff is a sovereign American Indian tribe organized pursuant to Act of Congress of June 18, 1934, that the Uintah and Ouray Reservation is an Indian Reservation created, existing and with its boundaries established pursuant to Executive Orders of October 3, 1861, January 5, 1882, and under and pursuant to Acts of Congress of May 5, 1864 and March 11, 1948. Said Reservation constitutes Indian country, is within Federal jurisdiction, and is governed by the laws of the United States and defendant has no jurisdiction or authority to levy or collect sales or use taxes against the plaintiff within this Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that sales taxes levied by the defendant on sales of the plaintiff and its tribal enterprise, Ute Fab, Ltd., are illegal and invalid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that defendant be permanently enjoined from making further levy and collection of sales and use taxes made by the Ute Indian Tribe or on sales to or by Indians within the exterior boundaries of the Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that defendant return to plaintiff the sum of $5,914.38, representing monies collected by the plaintiff and forwarded erroneously to the defendant as sales taxes for sales consummated within the exterior boundaries of plaintiff's Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count II of plaintiff's Complaint that defendant return to plaintiff the additional sum of $9,515.95, representing monies collected by the plaintiff and forwarded erroneously to the defendant as sales taxes on sales where delivery was made outside the exterior boundaries of plaintiff's Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count III of plaintiff's Complaint that defendant, State Tax Commission of the State of Utah, be and the same is hereby permanently enjoined from docketing further warrants against the Ute Indian Tribe pursuant to the provisions of Sections 59-15-11 and 59-16-15, U.C.A., 1953, as amended.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count III of plaintiff's Complaint that the warrant docketed against the plaintiff on May 22, 1974, in the total amount of $920.10 is null and void, having no force or effect whatsoever.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count IV of plaintiff's Complaint that plaintiff's taxing ordinance is legally enacted, is valid and is in full force and effect from January 1, 1974.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count IV of plaintiff's Complaint that the assessment, levy and collection of sales or use taxes by defendant on sales subject to plaintiff's ordinance are illegal and in violation of the Constitution of the United States.

DATED this 25th day of February, 1976.

WILLIS W. RITTER
Chief Judge
United States District Court

II. OPINION OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1602

THE UTE INDIAN TRIBE,

Appellee,

v.

STATE TAX COMMISSION OF THE STATE OF UTAH,

Appellant.

Appeal From The United States District Court
For The District of Utah
(D.C. # C-74-183)

Tom D. Tobin, Special Assistant Attorney General (Vernon B. Romney, Attorney General, G. Blaine Davis, H. Wright Volker, Michael L. Deamer, Assistant Attorneys General, with him on the Brief), for Appellant.

F. Burton Howard, Salt Lake City, Utah (Scott C. Pugsley, of Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, with him on the Brief), for Appellee.

Before SETH, Chief Judge, DOYLE, Circuit Judge, and STANLEY, Senior District Judge.*

SETH, Chief Judge.

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*Of the District of Kansas, Sitting by Designation.

This is an action brought by the Ute Indian Tribe against the State Tax Commission of the State of Utah for injunctive relief and for a declaratory judgment that the State of Utah sales taxes could not be levied or collected on sales of personal property made by a tribal enterprise within the boundaries of the Uintah and Ouray Reservation. The complaint also seeks the return of funds theretofore collected by the Tribe on such sales, and remitted to the State of Utah.

The trial court enjoined the State from seeking to collect sales taxes on sales made by the Tribe on the reservation, and directed the return to the Tribe of the collections theretofore made on such sales. The trial court determined that the reservation boundaries were as originally established. The State has taken this appeal.

It is apparent that this appeal is controlled basically by *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, and *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164.

In *Moe* the Court considered the relationship between 28 U.S.C. § 1341, which generally prohibits injunctions preventing the levy or collection of state taxes if there is a plain and speedy state remedy, and 28 U.S.C. § 1362 which gives the district courts jurisdiction over "all" civil actions brought by Indian Tribes in controversies arising under the Constitution, laws, or treaties of the United States. The Court in *Moe* decided that 28 U.S.C. § 1362 was intended to grant jurisdiction to the district courts in civil actions in all instances where the United States could have or had the requisite interest to commence such suit. The Court relied on *Heckman v. United States,* 224 U.S. 413, and *United States v. Rickert,* 188 U.S. 432. The Court in *Moe* then said:

> ". . . Since the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, *Department of Employment v. United States, supra,* we hold that the Tribe is not barred from doing so here."

The Court in *Moe* thus indicated that the above interpretation of section 1346 was the proper method to apply section 1341 rather than using the federal instrumentality doctrine. The basis is described as a preemption of State taxing authority by federal legislation. This also apparently meets the Eleventh Amendment arguments. The Court also there discussed the state service arguments, and the General Allotment Act arguments advanced by the State of Montana. The Court in *Moe* held that it is proper to give special treatment and special preference to the Indians because they are Indians. Thus they were so set apart on racial grounds as in *Morton v. Mancari,* 417 U.S. 535, quoted by the Court. The court also discussed the checkerboard problem arising from non-Indian land ownership within the reservation boundaries, and again held that the fact the plaintiffs were of a particular "racial" group and tribal organization permitted them to assert rights not available to non-Indians in the same area. They can also assert rights over non-Indians in the same area under *Morton v. Mancari,* 417 U.S. 535, cited in *Moe.*

The Court in *Moe* concluded that the State of Montana could not assess a vendor's license fee against an Indian for selling cigarettes on "reservation land," and could not apply the cigarette sales tax on "reservation sales" by Indians to Indians. The Court expressly did not extend the prohibition to sales by Indians on Indian land to non-Indians. The Montana tax was on the consumer and precollected. The Court also held that the

Indian retailer could be required to collect the tax for the State on sales to non-Indians.

The Utah sales tax under Utah Code Ann. § 59-15-1 places a tax on the purchaser of tangible personal property. The seller collects the tax on behalf of the State from the buyer at the time of the sale, and remits to the State. Where a "sale" is made is defined by Utah law and for the most part is where the goods are delivered.

Insofar as this action seeks to have the State of Utah return sales taxes collected by the Tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the State were paid by the buyers of the goods and not by the sellers. If anyone can seek recovery or refund, it is these buyers.

The portion of the complaint which seeks to enjoin the imposition of a sales tax is another matter. Under the decisions of the Supreme Court, referred to above, sales on trust lands by the Tribe to Indians are not subject to the state sales tax. The State here so acknowledges. The provisions of the Utah Enabling Act do not lead to a different conclusion.

As to sales by the Ute commercial enterprise here concerned on trust lands to non-Indians, the Utah sales tax is applicable. This is also in accordance with *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463.

We also hold that sales not on trust lands by the Tribe to Indians only are not within the state taxing power.

We are unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands. The issue was not litigated apparently

due to a misunderstanding as to a provision in the pretrial order. Also this was a matter which required the proof of facts and of the application of law. It was not subject to a stipulation binding on the court in any manner. The finding by the trial court as to the reservation boundaries or as to trust lands was clearly erroneous. Again, under the circumstances, this may not be an issue.

The case must be REVERSED AND REMANDED for further proceedings consistent with this opinion.

III. ORDER DENYING PETITION FOR REHEARING

MAY TERM — June 2, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and Honorable Arthur J. Stanley, Jr., Senior District Judge

No. 76-1602

THE UTE INDIAN TRIBE,
Plaintiff-Appellee,

vs.

STATE TAX COMMISSION OF THE STATE OF UTAH,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Doyle and Senior District Judge Stanley to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. I, § 8 — CONSTITUTION OF THE UNITED STATES

The Congress shall have Power . . .

• • •

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Art. III — CONSTITUTION OF UTAH

Second:—The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. The lands belonging to citizens of the United States, residing without this State shall never be taxed at a higher rate than the lands belonging to residents of this State; but nothing in this ordinance shall preclude this state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, by patent or other grant, a title thereto, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress, containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such extent, as is or may be provided in the act of Congress granting the same. (As amended November 5, 1946, effective January 1, 1947.)

UTAH ENABLING ACT (28 Stat. 107)

Second:—That the people inhabiting said proposed State do agree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such Act of Congress may prescribe.

UNITED STATES CODE 25 § 476

Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the

case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

25 § 1322 — Assumption by State of civil jurisdiction — Consent of United States; force and effect of civil laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such state to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of

general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, use, and probate of property

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Force and effect of tribal ordinances or customs

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub.L. 90—284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.

UTAH CODE ANNOTATED, 1953, AS AMENDED

58-15-2. Definitions — Scope — Exemptions — Retail sales — Wholesale sales.

• • •

(b) The term "sale" or "sales" includes installment and credit sales, every closed transaction constituting a sale, and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this

act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale. An even exchange of tangible personal properties shall not be deemed a sale for purposes of this act, but in any transaction wherein tangible personal property is taken as part of the sales price of other tangible personal property, the balance valued in money or other consideration shall be deemed a sale.

• • •

(h) The word "tax" means either the tax payable by the purchaser of a commodity or service subject to tax, or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which he is required to report his collections, as the context may require.

59-15-4. Excise tax — Rate. — From and after the effective date of this act there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to four per cent of the purchase price paid or charged, except that where a person takes, as a trade-in for part payment of the merchandise sold, tangible personal property other than money, that tax shall be computed and paid only upon the net difference between the selling price of the merchandise sold and the amount of the trade-in allowance. The sale of coal, fuel oil and other fuels shall not be subject to tax except as hereinafter provided.

59-15-5. Collection of tax — Remission — Returns — Direct payment by purchaser of motor vehicle — Tokens — Deposit of security and sale thereof — Remission of excess amount collected — Penalties and interest for violations — Fine or imprisonment. — Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said

sale; provided, however, that where any sale of tangible personal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sale, but the said retailer shall be solely liable for the said tax. The vendor shall collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act, provided, however, that on all motor vehicle sales made by other than a regular licensed dealer the tax shall be paid by the purchaser directly to the state tax commission upon every sale of a motor vehicle subject to registration and licensing under the laws of this state, and shall be collected by the state tax commission at the time of such registration and licensing. The tax imposed by this act shall be due and payable to the state tax commission quarterly on or before the thirtieth day of the month next succeeding each calendar quarterly period, the first of such quarterly periods being the period commencing with the first day of January, 1953. Every vendor shall on or before the thirtieth day of the month next succeeding each calendar quarterly period, file with the commission a return for the preceding quarterly period. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the vendor for the period covered by the return. The tax as computed in the return shall in all cases be based upon the total sales made during the period including both cash and charge sales. Credit shall be allowed to the vendor for taxes paid on sales represented by that portion of an account determined to be worthless and actually charged off for income tax purposes or on the portion of the purchase price remaining unpaid at the time of a repossession made under the terms of a conditional sales contract. Such returns shall contain such information and be made in such manner as the tax commission may by regulation

prescribe. The state tax commission may extend the time for making returns and paying the taxes collected under such rules and regulations as it may prescribe, but no such extension shall be for more than ninety days. The state tax commission, if it deems it necessary in order to ensure the payment of the tax imposed by this act, may require returns and payment of the tax to be made for other than quarterly periods.

If the accounting methods regularly employed by the vendor in the transaction of his business are such that reports of sales made during a calendar month will impose unnecessary hardships, the state tax commission may accept reports at such intervals as will in its opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax.

For the purpose of more efficiently securing the payment, collection and accounting for the taxes provided for under this act, the tax commission in its discretion, by proper rules and regulations, shall provide for the issuance of tokens or other appropriate devices to facilitate collections; provided, no tax or token shall be collected on lunches or dinners served by schools, churches, or charitable institutions.

The tax commission, whenever it deems it necessary to ensure compliance with the provisions of this act, may require any person, subject to the tax imposed hereunder to deposit with it such security as the state tax commission shall determine. The same may be sold by the state tax commission at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail; if by mail, notice sent to the last known address as the same appears in the records of the state tax commission shall be sufficient for the purposes of this requirement. Upon such sale the surplus if any, above the amounts due under this act, shall be returned to the person who deposited the security.

If any vendor shall, during any reporting period collect as a tax an amount in excess of two per cent of his total taxable sales, he shall remit to the commission the full amount of the tax herein imposed and also such excess; and if any vendor under the pretence or representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two per cent of his total taxable sales, the retention of such excess or any part thereof, or the intentional failure to remit punctually to the tax commission on the full amount required to be remitted by the provisions of this act, is declared to be unlawful and shall be punishable by a fine of not exceeding $1,000 or by imprisonment for not to exceed six months or both such fine and imprisonment.

Any person failing to pay any tax to the state or any amount of tax herein required to be paid to the state within the time required by this act, or file any return as required by this act, shall pay, in addition to the tax, penalties and interest as provided in section 59-15-8 hereof.

59-15-8. Overpayment and deficiencies. — As soon as practicable after the return is filed, the tax commission shall examine it; if it then appears that the correct amount of tax to be remitted is greater or less than that shown on the return to be due, the tax shall be recomputed.

If the amount paid exceeds that which is due, the excess, together with interest thereon at the rate of one-half of one per cent per month from the date of overpayment, and if it is determined that the original overpayment was not intentionally made for purposes of investment, it shall be credited or refunded to the person paying it upon written application therefor. If the commission determines that any amount, penalty or interest has been paid more than once or has been erroneously or illegally collected or computed, the commission shall certify to the state auditor the amount collected in excess of what was legally due, from whom it was collected or by whom paid to the commission, and the amount of interest computed

thereon, and if approved by the state auditor, it shall be credited on any amounts then due from that person to the state of Utah under this act or under any other taxing act, the administration of which is vested in the commission and the balance shall be refunded to that person or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim is filed with the state tax commission within three years from the date of overpayment.

In the event any amount has been illegally determined to be due from any person, the commission shall authorize the cancellation of the amounts upon its records.

If the amount paid is less than the amount due, to the difference shall be added interest thereon at the rate of one-half of one per cent per month from the time the return was due.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent of the total amount of the deficiency and interest at the rate of one percent per month on the amount of the deficiency from the time the return was due. If any part of the deficiency is due to fraud with the intent to evade, there shall be added one hundred per cent of the total amount of the deficiency and interest at the rate of one per cent per month on the deficiency from the date the return was due.

The deficiencies in tax, together with penalties and interest imposed by this section, shall be due and payable by the taxpayer within ten days after notice and demand by the tax commission; except that when the commission determines that a greater amount was due than was shown on the return, and the tax is not deemed to be in jeopardy, the additional tax, penalty and interest shall be due payable within thirty days after the commission mailed its report of deficiency determination.

Except in the case where a deficiency is due to fraud with intent to evade tax or a failure to file a return, the

amount of taxes imposed by this chapter shall be assessed within three years after the return was filed and if not so assessed no proceeding for the collection of the taxes shall be begun after the expiration of the period.

In the case of a false or fraudulent return or payment with intent to evade tax or of failure to file a return, the tax may be assessed or a proceeding for the collection of the tax may be begun without assessment at any time.

Upon making a record of its reasons, the commission shall have the power, in its discretion, to waive, reduce or compromise any of the penalties or interest provided in this chapter.

59-15-11. Collection of tax by warrant. — A tax due and unpaid under this act shall constitute a debt due the state from the vendor and may be collected, together with interest, penalty and costs, by appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies.

If the tax imposed by this act or any portion thereof is not paid when the same becomes due and if the vendor liable for the payment of the amount has not regularly followed the procedure outlined in sections 59-15-12, 59-15-13, 59-15-14, 59-15-15, and 59-15-16 hereof, the tax commission may issue a warrant in duplicate, under its official seal, directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of a delinquent taxpayer found within his county for the payment of the amount due thereof, with the added penalties. interest, and costs and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant. Immediately upon receipt of said warrant in duplicate the sheriff shall file the duplicate with the clerk of the district court in his county and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the delinquent taxpayer mentioned in the warrant and, in appropriate columns,

the amount of tax, penalties, interest and costs for which the warrant is issued and the date when such duplicate is filed, and thereupon the amount of such warrant so docketed shall have the force and effect of an execution against all personal property of the delinquent taxpayer and shall also become a lien upon the real property of the delinquent taxpayer in the same manner as a judgment duly rendered by any district court and docketed in the office of the clerk thereof. The sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner as is prescribed by law in respect to executions issued against property upon judgments of a court of record and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.